strictly, in this case it appeared that the respondent himself had not complied with the rule as service on the appellant had been effected on the appellant's supposed solicitor. The appellant was therefore left without a remedy.

CIVIL APPEAL.

B.M. Bodipalar for the appellant.

Wee Cheng Huat for the respondent.

Abdul Razak J.: In this appeal the appellant has asked the court to restore his right to set aside the judgment in default entered against him by the President Sessions Court at Kuala Trengganu.

The appellant/defendant was a company dealing in hire-purchase vehicles. A car was lent on hire-purchase to the respondent/plaintiff by the appellant on the usual terms. As usual with some customers, default was made by the respondent/plaintiff to pay up his instalments due. The car was consequently repossessed by the appellant as the owner. The respondent followed it with a writ alleging the illegality of the seizure.

The summons issued asked the parties to appear before the President on a date specified therein. It also asked the defendant to file a defence in due form within the time also specified therein. But on the mention date the defendant's solicitor was absent. A solicitor purporting to be the agent for the defendant's solicitor Mr. Lee Leng Guan was present on his behalf instead. The respondent's counsel was present. It transpired that the respondent's counsel had raised several objections, the principal one being that the appellant/defendant not having duly filed his memorandum of retainer under Order 7 rule 1 of the Subordinate Courts Rules, the appellant's solicitor had therefore no *locus standi* before the President and it followed the solicitor purporting to act for the appellant's solicitor had also no *locus standi*. The President accepted this view and held consequently that since the appellant himself was not present and there was no explanation for his absence the respondent was entitled to judgment in default which he duly gave dismissing the action.

I am constrained to say that ordinarily Order 7 rule 1 must be construed strictly. It means that failure to file the memorandum debars a solicitor from taking any steps for his client. One can quite see the propriety and logic of this requirement. There is no similar provision in the Supreme Court Rules if only because I think in the nature of things the kind and category of people the High Court would be dealing with are assumed generally to be somewhat sophisticated and better informed than those at the Lower Court. Clearly the Subordinate Courts Order is provided with the intention of safeguarding the interest of the public against the evil of those who may claim to act under a cloak of authority when they possess none. It is necessary therefore under those circumstances in order that the public interest is protected that such counsel only are allowed to deal with members of the public whose retention is first made known to the court before they acted. I would say therefore that on that basis the appellant's appeal would have no merit and should be dismissed.

But on the other hand before any application to enter judgment, even if allowed, is made it must be shown first that there has been the necessary compliance with the rules by the plaintiff himself. In this respect it would appear that he has not done so. It is clear that service on the appellant/defendant was effected through the appellant's supposed solicitor although it was clearly shown that he was not on record at that stage to have been retained by the appellant since the memorandum of retainer had not been filed. It is true there had been negotiations between the parties through their counsel prior to the action in court but obviously from their present stand the respondent is saying that that was not a sufficient basis for stating that the appellant's solicitor had been retained by his client. Against this the respondent might say that since it was known that the appellant's solicitor was already informally acting for his client, it was sufficient if service was effected on him although they would still be required to file the memorandum of retainer if and when they chose to act further. But that step would, in my view, clearly be to expose the appellant dangerously to the risk (as it has happened in this case) that his solicitor might make default in filing the memorandum with the resultant consequence that judgment in default might be entered against him although he had no opportunity to appear (and since service was not effected on him in the first place) he was entirely not to be blamed. In my view it is ludicrous to suggest that a party should lose his claim altogether merely because opposite counsel would agree among themselves that they would rely on the other to comply with the rule but for some reason he did not when it was clearly known that since the other counsel did not file his retainer the proper person to have been served in the first place was the opposite party himself. As it was the appellant's purported solicitor was served instead and the appellant was left without a remedy.

I would therefore allow the appeal with costs and order that the judgment of the learned President be set side, with liberty to counsel to apply.

Appeal allowed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Adnan & Wee.*

SAK & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Abdul Razak J.) November 4, 1976]

[Kuala Trengganu — Criminal Appeal No. 14 of 1975]

Fisheries — Territorial waters — Trawling without licence in territorial waters — Strict liability — Fishery (Maritime) Regulations, 1967, reg. 3(a) — Fisheries Act, 1953, s. 13(1).

The appellants were caught operating a Thai fishing boat inside Malaysian territorial waters off Pulau Perhentian, Besut. They were arrested and charged under Regulation 3(a) of the Fishery (Maritime) Regulation 1967. The appellants denied that they were in Malaysian waters and claimed that they were arrested by the Marine Police 16 miles off Pulau Perhentian, in international waters.

Held, dismissing the appeal: the offence was one of strict liability. The words "found operating" clearly connotes an offence merely by the commission of the physical act of operating regardless of the mental element.

Case referred to:-

(1) *Juk De Sa* v. *Public Prosecutor* [1975] 1 M.L.J. 283.

CRIMINAL APPEAL.

P. Nadarajan for the appellants.

Mohamed Nor bin Mohamed (Deputy Public Prosecutor) for the respondent.

Abdul Razak J.: This is an appeal against conviction and sentence from the decision of the President of the Sessions Court sitting at Besut. The charge reads as follows:

"That you, on April 8, 1975, at about 11.15 a.m. at position 10.8 miles away Pulau Perhentian Kecil, bearing 211 degree Pulau Susu Dara, 180 degree Bukit Pulau Pernentian Besar and 188 degree Pulau Pernentian Kecil, in Malaysian Maritime Territorial Water, in the District of Besut, in the State of Trengganu, were found operating a trawl net with a boat named 'Phong Tip Sri Kongka', without a licence, and that you have thereby committed an offence under Regulation 3(a) of the Fishery (Maritime) Regulations 1967 as amended, and punishable under section 13(1) of the Fisheries Act No. 8 of 1963."

A fine of $150 was imposed on the captain and $100 each on the crew. There were altogether 22 persons charged. The boat, subject matter of the offence, was forfeited. At the close of the defence case the accused No. 3 was acquitted and discharged.

The facts of the case are quite simply that on the 8th of April, 1975, the Marine Police spotted a Thai boat fishing inside Malaysian territorial waters off Pulau Perhentian, Besut. The Police later found the Thai boat trawling. They were arrested and taken to Kuala Besut.

According to PW(1), the Marine Police Commander, the Police boat was about 7.5 miles from Pulau Perhentian when they first saw the Siamese boat. At that time the latter was about 3 miles from him. They found out that the boat was trawling when they were about 2 miles from the Siamese boat. The point at which they finally caught up with the appellant was about 10.8 miles from Pulau Perhentian and the time then was about 11.15 a.m. They first spotted the boat at 10.50 a.m. PW(1) gave his position when they were 7.5 miles off Pulau Perhentian as bearing Pulau Susu Darat 219° and bearing Tanjong Telok Kurma 190°. At the time when they were alongside the Siamese boat their position was Pulau Perhentian Kecil 188° and bearing Pulau Perhentian Besar 180° and bearing Pulau Susu Darat 211° and the distance from the nearest shore at that time to the Siamese boat was 10.8 miles within Malaysian territorial waters. These bearings were confirmed by PW(4), the navigator.

The defendants denied they were in Malaysian territorial waters. They said they were arrested by the Marine Police when 16 miles off Pulau Perhentian, in other words, when in international waters. They made their calculations with their own compass and made the necessary markings on their map which they produced.

It was contended before me that the learned President was wrong in coming to his conclusion that the appellants were fishing in Malaysian territorial waters. It was argued that if the Police reckoning was correct than it would mean that the Police boat took about an hour to travel a mile and it would also mean that the Siamese boat travelled only .03 mile an hour which figures they said were impossible to arrive at. They based this on the theory that if the Police boat was 7½ miles from the island and the appellants' was 3 miles away, the latter would be 10½ miles from the island before the Police started to chase them. If the Police said they caught the appellants at 10.8 miles then they would have taken 3 miles in 25 minutes and the accused to travel .03 mile for the same period taking 10.50 a.m. and 11.15 a.m. to be the time the Police left and arrested the appellants respectively. With due respect, I cannot accept this theory. As argued by the learned Deputy Public Prosecutor we do not know where the appellants were in relation to the island and if I may say so in relation to the mainland at the time when the Police said they were 7½ miles from the island of Pulau Perhentian when they first spotted the Siamese boat. What was established merely was that the appellants were 10.8 miles from the said island when the Police caught them. They could, in other words, have been well inside Malaysian territorial waters (as our illegal trawlers do sometime) between the island and the mainland. That is not unlikely because as we see it Pulau Perhentian looks at least 10 miles or more away from the mainland. In that situation the appellants could well be 7 miles or more away from the island directly behind it and between the mainland and the island. If the nearest point to the international waters to make his escape is directly opposite him on the other side of the island then we know that he has to cover at least 7+10.8= 17.8 miles, i.e. taking the route to be in a straight line. But he has in such a case to go round Pulau Perhentian which would inevitably mean that it would lengthen further his route to international waters by even a few more miles. The 25 minutes taken to cover the distance the Police caught up with the appellants was therefore well within a proportionate time. It was said that the prosecution witnesses could not be relied upon because they contradicted themselves in material particulars. One said that he entered the bearing of the various places in a log book whereas the other said it was not so. In fact one of them said that he entered the markings on the chart only on the morning of the trial. Be that as it may, one notes that one of them, PW4, did say that he entered the particulars in his diary and the diary was evidently shown to counsel at the trial. Judging from the questions subsequently put, it seems that there was no substantial variance between what the witness said in court and what he recorded in the diary. Otherwise, we would have heard in submission and in the cross-examination to the contrary. That being the case then the other apparent contradictions, if any, may only show non-compliance with the Marine procedure but not necessarily exposure of the frailty of the prosecution case. It was also said that there was no certificate produced that the Police compass was correct with which the Police measured their distance. There was evidence, however, that the compass was periodically checked. It was admitted that it was in error of 0.25° but that was said to be normal in the Merchant Navy. The Police said they used the radar also to get the estimated distance. These, of course, are questions of fact for the President to evaluate as to its worth

not for me to judge as to their real value. But against that, the appellants' compass was no more to be commended upon. It was a portable set which unlike the Police's was not fixed to the boat and the appellants said the rocking of the boat would affect the reading. Unlike the Police compass it was not checked before but after going to the sea. I have no doubt that these facts would have affected the President's mind. The defendants produced a plan but if the compass was unreliable then it would follow that their map must also be unreliable. This fact would no doubt have also influenced the President's mind. It was said that the offence was not of strict liability and therefore it was necessary to consider whether all the crew besides the captain had the necessary *mens rea* that they knew they were in territorial waters. In my view the offence is one of strict liability. The words "found operating" clearly connotes an offence merely by the commission of the physical act of operating regardless of the mental element. This must be so and must be intended to be so by the legislature because otherwise it would be impossible to apprehend all except the captain in a boat for operating in territorial waters.

I do not think I need to say what I have already said regarding forfeiture in the case of *Juk De Sa* v. *Public Prosecutor*.[1]

I would therefore dismiss the appeal.

Appeal dismissed.

Solicitors: *P. Nadarajan & Co.*

WONG MUN KONG v. PACIFIC & ORIENT UNDERWRITERS (M) SDN. BHD.

[O.C.J. (Gunn Chit Tuan J.) February 25, 1977]
[Penang — Civil Suit No. 310 of 1975]

Damages — Leg injuries — Assessment of quantum — Liability apportioned at 75:25.

Negligence — Road Traffic — Statutory right of driver — Duty of care — Contributory negligence.

The plaintiff, a nineteen year old student, sustained leg injuries when his motorcycle collided into a motor car. He suffered the following injuries:—

(i) Fracture in the shaft of the left femur;

(ii) Swelling with deformity and tenderness in the left thigh;

(iii) Compound fracture of the right femur;

(iv) Two puncture wounds, one over medial and the other over the lateral aspect of the right thigh, and

(v) Loss of a right leg below the knee.

As a result of the accident, the plaintiff could not squat anymore and had difficulty in climbing steps. On the facts it appeared that the plaintiff had executed a U-turn without looking behind. If he had done so he would have seen the car, which had the right of way.

Held: (1) the statutory right of way of a driver must be used with due regard to the rights of others. Therefore, if a driver knows or ought to know that some other person by that person's fault is in a position of danger, the statutory right of way cannot be exercised without care being taken to avoid the consequences of that other's fault;

(2) the defendant should have in the circumstances of this case taken care to avoid the consequences of the plaintiff's fault. His liability should be assessed at 25%;

(3) the plaintiff by his foolish act in making a U-turn without looking behind him was guilty of contributory negligence and his culpability should be assessed at 75%;

(4) as general damages had been agreed at $40,000 judgment will be given for the plaintiff for $10,000 as general damages and $1,340 for special damages.

Cases referred to:-

(1) *K.R. Taxi Service Ltd. & Anor.* v. *Zaharah & Ors.* [1969] 1 M.L.J. 49, 51.

(2) *London Passenger Board* v. *Upson* [1949] A.C. 155, 173.

(3) *Thompson & Thompson* v. *Jaeger* [1946] 3 W.W. R. 407; E. & E. Digest Vol. 36 para. 673, p. 99.

CIVIL SUIT.

Ong Eng Khuan (*Ong Chin Beng* with him) for the plaintiff.

S. Venugopal for the defendant.

Gunn Chit Tuan J.: The plaintiff in this case was a nineteen-year-old student at the time of the accident. On the 30th day of August, 1973, at about 12.30 a.m. he was riding a 100 c.c. Honda motorcycle with registration number PL 7269 along Gurney Drive, Penang, from the direction of Cantonment Road towards Northam Road. A collision occurred between his motorcycle and a motor car with registration number KC 6332, which was also proceeding along Gurney Drive towards Northam Road, when the plaintiff was making a U-turn towards Cantonment Road.

On the 8th day of July, 1975, the plaintiff filed a suit for damages for personal injuries and consequential loss against one Mukianto Kosasih who was the driver and one Madam Lim Ah Nya alias Lim Say Choo who was the owner of the said car. The writ of summons could not be served on either of them and on the 22nd day of January, 1976, the plaintiff obtained an order for substituted service to be effected on them by posting a copy of the writ and a copy of the order for substituted service on their last-known address as well as on the notice board of the High Court at Penang. Appearance was apparently entered for them on the 5th day of April, 1976, by a firm of solicitors, Messrs. Goh Lim Eam & Muttiah of Penang, but on the 17th day of May, 1976, a memorandum of change of solicitors was filed by R.K. Nathan & Co., a firm of solicitors in Kuala Lumpur, who also filed a statement of defence. The said firm of R.K. Nathan & Co. later filed a notice of motion on the 3rd day of September, 1976, together with affidavits affirmed by one Gary Mah, the Claims Executive of Pacific & Orient Underwriters (M) Sdn. Bhd., the present defendant in this case. My brother Justice Arulanandom who heard the said notice of motion was satisfied that neither the driver nor the owner of the car could be traced and that the plaintiff's claim in this case was one in which the judgment could be enforced against the present defendant under section 80(1) of the Road Traffic Ordinance, 1958, and made a consent order on the 1st day of November, 1976, that the present defendant be substituted in place of the driver and the owner of the car and be allowed to defend the action therein.

The case finally came before me for hearing on the 1st day of February, 1977. As expected, the